1-3100-9398-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Mitchell J. Anderson,

Petitioner,

vs.

St. Paul Public Housing Authority,

Respondent.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck, commencing at 9:30 a.m. on Friday, March 24, 1995, at the Office of Administrative Hearings, Suite 1700, 100 Washington Avenue South, Minneapolis, Minnesota. The record closed at the conclusion of the hearing on March 24, 1995.

Stephen L. Heller, Esq., 905 Jefferson Avenue, Suite 201, St. Paul, Minnesota 55102, appeared on behalf of the Petitioner, Mitchell J. Anderson. Michael F. Driscoll, Assistant City Attorney, City of St. Paul, 400 City Hall and Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the St. Paul Public Housing Authority.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained in this recommended decision. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this recommended decision to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, telephone (612)297-5828, to determine the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether or not the Petitioner was voluntarily demoted so as to exclude him from the protection of the Veterans Preference Act.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mitchell J. Anderson is a veteran of the United States Marine Corp and was honorably discharged on October 3, 1978. Petitioner's Ex. 1.

2. Mr. Anderson was hired by the Respondent on July 27, 1992, as a maintenance helper. After serving for four months in this position, he was promoted to the position of assistant caretaker. Assistant caretakers help the resident caretakers with their duties, including cleaning the building and doing maintenance work. He worked at eight different high rises. The overall goal for the position is to maintain the Respondent's buildings and grounds in a safe, habitable and attractive condition. Petitioner's Ex. 3.

3. Mr. Anderson received a six-month employee appraisal on January 15, 1993. The appraisal indicates that he "met requirements" in all of the primary job factors and exceeded requirements for quality of work, as reflected in thoroughness, accuracy, application of knowledge and experience and meeting of deadlines. The appraisal indicated that Mr. Anderson was "a good caretaker assistant. He is an asset to the department and agency. Sometime in the future he would like to be a caretaker." Petitioner's Ex. 2.

4. Mr. Anderson was next evaluated on April 19, 1993. The written evaluation indicates that he "met requirements" on all primary job factors. The written comments indicate that "Mitch has done a good job filling in for caretaker. He has mentioned that in the near future there is a good possibility he would apply for a caretaker's position. I feel at this time he would do well in the new position." Petitioner's Ex. 4.

5. On October 28, 1993, the Petitioner applied for a resident caretaker position which had opened up. He interviewed for the position and received a total score of 90 points before veterans preference points were added. Petitioner's Ex. 6. He was the most senior applicant for this promotional position. Mr. Anderson was hired for the position. His new supervisor was Al Rojas.

6. The duties of a resident caretaker include preparing vacant units for rerental, performing service requests, providing caretaker services and janitorial duties. Petitioner's Ex. 7. Under Article 6, § 6.2 of the collective bargaining agreement, promoted employees are required to serve a six-month promotional probationary period. The Petitioner's probationary period for the resident caretaker position ran from January 10, 1994 to July 10, 1994.

7. Mr. Anderson was assigned as the resident caretaker for a high-rise unit at 1085 Montreal Avenue in St. Paul. The building consists of 18 stories and 186 units. On January 19, 1994, Mr. Rojas discussed the performance standards for the position with the Petitioner. Respondent's Ex. 8.

8. Mr. Anderson received his first employee appraisal as a resident caretaker on April 13, 1994, which was a three-month appraisal during his probationary period. The Petitioner was rated as "below requirements" in half of the job factors. The supervisor, Al Rojas, commented that "Mitch needs to improve in his routine cleaning of the building and maintain a higher level of quality on a regular basis in order to continue at this position." The overall rating was "unsatisfactory performance". Respondent's Ex. 3.

9. On May 13, 1994, an inspection of Mr. Anderson's building was conducted by Al Rojas and Cheryl Wagner. Although most items checked during the inspection were found to be satisfactory, there were also a number of unsatisfactory conditions for which directions were given to correct the condition. The overall condition of the building was rated as "fair". Petitioner's Ex. 9.

10. After the three-month review, Al Rojas visited the Montreal building more often and pointed out problems to Mr. Anderson. On a couple of occasions, Mr. Rojas indicated that complaints had been made to the Mayor's office about the building not being clean. However, when the Petitioner checked with the Mayor's office in June of 1994, they indicated that they had no record of any complaints during 1994 for 1085 Montreal Avenue. Petitioner's Ex. 10.

11. The Petitioner's probationary period was due to end July 10, 1994. He received a written appraisal on June 10, 1994. This appraisal found Mr. Anderson to be "below requirements" in four of 10 work factors. Overall, his performance was rated as unsatisfactory. The supervisor commented that, "Mitch needs to show improvement in all below-requirement areas and maintain a higher level of performance on a regular basis. Areas to be worked on by the employee included interpersonal skills, accepting the supervisor's guidance and learning to sustain productive work." Respondent's Ex. 5. It was also noted that the Petitioner is a hard-working employee and a skilled individual. Mr. Rojas and his supervisor, Rick McKellep, advised Mr. Anderson at the time of this review that his improvement had not been sufficient, that his job was in jeopardy and that he could either drop to an open assistant caretaker position or face the consequences. Mr. Anderson was upset and frustrated and suggested he might file a grievance. It was suggested that Mr. Anderson think it over during his vacation.

12. Mr. Anderson then went on vacation for a week starting in mid-June. When he returned toward the end of June, Mr. Rojas advised him that that would be his last day as caretaker and that he was being offered his former position of assistant caretaker. Mr. Rojas advised Mr. Anderson that he would not pass probation and that if he did not accept a voluntary demotion he would have to face the consequences.

13. A couple of days later, Mr. Rojas prepared a voluntary demotion form for Mr. Anderson to sign and gave it to him. Mr. Anderson called his union business manager and told him he felt this was an injustice since he had no other alternative than being laid off. The business manager advised Mr. Anderson that he could file a grievance or sign the voluntary demotion by indicating he was "signing under protest". Petitioner's Ex. 12.

14. Mr. Anderson then submitted the voluntary demotion form to Mr. Rojas, but crossed out the word "voluntary" and wrote "under protest" and "forced into it" on the form. Mr. Rojas presented this form to his supervisor, Mr. McKellep, who indicated that

the changes were not acceptable. Mr. Rojas then asked Mr. Anderson for another statement and advised him that he faced termination if he did not sign it. Mr. Anderson then signed a written statement dated June 24, 1994, that stated, "I Mitch Anderson willing to volunteer for demotion to Asst. Caretaker." Respondent's Ex. 6.

15. Neither Mr. Rojas nor Mr. McKellep knew that Mr. Anderson was a veteran and neither they nor the PHA Human Resources Department advised the Petitioner of his veterans preference rights. If Mr. Anderson had not accepted the demotion, Mr. Rojas would have recommended an involuntary demotion or discharge.

16. The Human Resources Department did not advise the Petitioner of his veterans preference rights since it believed this to be a voluntary demotion resulting from discussions between the supervisors and Mr. Anderson. The notification of personnel action for Mr. Anderson effective July 8, 1994, describes the situation as "Voluntary demotion to previous position as caretaker assistant." Respondent's Ex. 7.

17. A number of the residents of 1085 Montreal signed a petition stating that they would like Mr. Anderson to remain as the caretaker. Petitioner' Ex. 11.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 197.481 and 14.50.

2. The Petitioner and the Respondent received timely and proper notice of the hearing.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.447 and 197.46.

5. Respondent is a political subdivision of the State of Minnesota for purposes of Minn. Stat. §§ 197.455 and 197.46.

6. Under Minn. Stat. § 197.46, veterans cannot be removed from their position except for incompetency or misconduct shown after a hearing. An involuntary demotion for poor performance would constitute a removal under this statute even though it occurred during a probationary period.

7. The Petitioner's demotion was not voluntary.

8. That the Petitioner was involuntarily demoted for alleged substandard performance without being advised of his right to a hearing on those allegations.

9. These Conclusions are arrived at for the reasons set out in the Memorandum which follows.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Department of Veterans Affairs order that the Petitioner be reinstated to his position as resident caretaker and awarded any lost back pay or benefits.

Dated this 4th of April, 1995

/s/
GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 22,900, 22,899 and 22,898.
No transcript prepared.

MEMORANDUM

Under Minn. Stat. § 197.46, municipal employees who are veterans separated from the military service under honorable conditions, cannot be removed from their position or their employment except for incompetency or misconduct shown after a hearing, upon due notice and stated charges, in writing. The Respondent concedes that the Petitioner was given no notice of a right to a hearing and no notice concerning his veterans preference rights when he was demoted. The Respondent also concedes that if it involuntary demoted Mr. Anderson, Mr. Anderson would be entitled to a notice of his right to request a hearing within 60 days of receipt of the notice of intent to demote. The Respondent therefore concedes that the fact that Mr. Anderson was on probation does not affect this case as it would for a non-veteran. State ex rel. Sprague v. Heise, 278 Minn. 367, 371, 67 N.W.2d 907, 910 (1954). The Respondent contends, however, that the demotion in this case was voluntary and therefore falls outside of the protection of the Veterans Preference Act. Southern Minnesota Municipal Power

Agency v. Schrader, 380 N.W.2d 169, 172 (Minn. App. 1986) rev. on other grounds 394 N.W.2d 796.

The facts in this record indicate that Mr. Anderson's supervisor believed that the Petitioner had significant performance problems during his probationary period as resident caretaker. Both written performance evaluations during 1994 indicate that improvement would be needed if he was to be retained in the position. The Petitioner did not agree with this assessment. Mr. Rojas, the supervisor, told Mr. Anderson on June 10, 1994, that his job was in jeopardy because of these performance problems. Mr. Anderson was told that he could drop to the assistant caretaker position or stay in his present position and face the consequences, including the possibility of not passing probation. Mr. Anderson was told to consider the options while he was on vacation. When he returned from vacation, Mr. Rojas advised him that he would no longer be retained as resident caretaker, but could have the assistant caretaker position.

Mr. Rojas made it clear to Mr. Anderson that if he did not accept the voluntary demotion, he would be terminated. Mr. Anderson indicated his view of the situation by the changes he made to the first voluntary demotion statement presented to him by Mr. Rojas. Mr. Anderson crossed out the word "voluntary" and stated that he was "forced into it" and wrote "under protest" on the sheet. When that statement was not acceptable to Mr. Rojas' supervisor, the Petitioner was told he would have to sign the second sheet without such statements or be terminated.

All of the facts surrounding this matter must be considered in determining whether or not this personnel action was voluntary. It's clear that Mr. Anderson did sign a written statement stating that he was willing to volunteer for demotion. However, whether an employer has removed a veteran is a matter of substance and not of form. Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). Generally, the word voluntary means "arising from one's own free will" or "acting or performing without external persuasion or compulsion." American Heritage Dictionary (2d Coll. Ed. 1982). In this case, the demotion did not arise from Mr. Anderson's free will, nor can it be said that he acted without external persuasion. He was, in fact, told that his choice was either to accept the demotion or lose his job. The demotion was therefore coerced and cannot be said to be voluntary.

The protection afforded to veterans by the Veterans Preference Act is that if they are discharged for substandard performance, they are entitled to a hearing on those allegations if they request it. They must be given notice of this right if they are removed, even during a probationary period. There is no doubt that in this case if Mr. Anderson had flatly declined a demotion and the Respondent was then required to proceed with either a termination or involuntary demotion, it would have had to advise Mr. Anderson of his veterans preference rights and afford him a hearing to contest the allegations of poor performance. It cannot avoid this obligation by telling him he is going to lose his job unless he accepts a "voluntary" demotion.

This result is consistent with City of St. Paul v. Winger, 368 N.W.2d 779 (Minn. App. 1985). In that case, an honorably discharged veteran was promoted from Sergeant in the St. Paul Police Department to Lieutenant. There was a one-year probationary period for the Lieutenant position. At the end of that period, the Police

Chief returned the veteran to the rank of Sergeant. The Court of Appeals concluded that as a veteran, the police officer was entitled to a hearing. 368 N.W.2d at 780-781. The case implicitly recognizes the right of a promoted veteran to a hearing if he does not survive probation for performance reasons.

The Respondent argues that the decision in Anderson vs. City of Minneapolis, 503 N.W.2d 780 (Minn. 1993), supports its position. In that case, a veteran who was on voluntary disability leave for over three years was re-employed at a lower paying position when his leave ended. The veteran executed a voluntary demotion form when he returned to work which allowed him to retain his initial seniority date. The Supreme Court concluded that an employee on disability leave does not receive any benefits from the city and is considered to be retired from city employment. The veteran therefore had no employment rights when he returned to the lesser-paying position with the city. In the case at bar, there is no gap in employment as was the case in Anderson. The Petitioner was continuously employed by the Respondent and entitled to all his employment rights.

None of the cases cited specifically address the question of when a demotion is in fact voluntary where that question is later challenged. However, an employment action cannot be called "voluntary" where it must be accepted by the employee unless he wishes to lose his employment. Although Respondent's witnesses testified that Mr. Anderson was advised that he could take a chance at passing probation if he wanted to, it was made abundantly clear to the Petitioner that he was not going to pass probation and that accepting the demotion was his only hope of continued employment. Where an employee is forced to resign or be demoted, the action is not voluntary. Schrader, supra, 380 N.W.2d at 173.

Under all the circumstances, it is concluded, therefore, that Petitioner has established that he was removed from his position as Resident Caretaker for purposes of the Veterans Preference Act and that he is, therefore, entitled to a hearing on his demotion. The Petitioner has met his burden of proof and established that the demotion was based on perceived unsatisfactory performance, that he did not "voluntarily" demote, and that he was entitled to a hearing prior to that action being taken.

G.A.B.